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DECISION AND ORDER

IN THE MATTER OF the Complaint made by Dashminder Singh Sehdev by his litigation guardian and mother, Ms. Hersharn Kaur Sehdev, of Toronto, Ontario under the Human Rights Code, 1981, S.O. 1981, c.53, as amended, alleging discrimination in services on the basis of creed, sex and ancestry by Bayview Glen Junior Schools Ltd., the L. Doreen Hopkins Foundation and John Douglas Beggs.

A HEARING BEFORE: Peter A. Cumming, Q.C.

APPEARANCES: Ms. Luba Kowal, counsel for the Ontario Human Rights Commission

Mr. Rodney Hull, Q.C., counsel for all Respondents

Heard in Toronto, July 22, November 14 and 18, 1987.
Supplementary written submissions in respect of Argument were filed by February 29, 1988.

1. The Evidence.

Hersharn Kaur Sehdev and Pekinder Singh Sehdev, who reside in Toronto, are practicing Sikhs. They have two children, ages eight and one. In August, 1985, when their oldest boy, Dashminder, was six, the Sehdevs sought to enroll him as a student in the "Bayview Glen School", operated until early 1985 by the corporate Respondent, Bayview Glen Junior School Ltd., and since early 1985, and at the times relevant to the Complaint, owned and operated by the other corporate Respondent, the L. Doreen Hopkins Foundation. The school, founded in 1962, has an "Early School" in one location and an "Upper School" in a second location, both in Toronto (Exhibit #7).

Hersharn Kaur Sehdev, age 32, mother of Dashminder, was born in India and came to Canada some 10 years ago. She and her family now reside in Thornhill, just north of Toronto. She testified, and the amended Complaint (Exhibit #3) states, that on August 22, 1985, she inquired by telephone about admission for Dashminder into Grade 1, and also for a nephew to the kindergarten of the Bayview Glen School. She testified she was told there was still a vacancy in the kindergarten, but her son would have to have an interview for admission to Grade 1.

The next day, August 23, 1985, Mrs. Sehdev attended at the school with both children, but was told there was then no vacancy in the kindergarten for the nephew. Mrs. P.E. Maxwell, a school employee, interviewed Dashminder and said that she would telephone with the school's decision about Dashminder.

Mrs. Sehdev testified that Mrs. Maxwell called on August 26 to advise that her son was academically acceptable for admission, but that wearing a turban was inconsistent with the school's strict uniform policy. Mrs. Sehdev did not object to the school uniform, in fact she liked the idea, but replied that wearing a turban (actually a handkerchief, a form of turban, for a small child) was a necessary, integral part of the Sikh religion. Mrs. Sehdev also indicated her son could wear a turban that was colour coordinated with the school uniform. Mrs. Sehdev testified that Mrs. Maxwell then suggested that Mrs. Sehdev speak with the school principal, the individual Respondent, John Douglas Beggs.

On August 27, Mrs. Sehdev spoke with Mr. Beggs by telephone. She testified that Mr. Beggs advised that the school's strict uniform policy precluded admission of a Sikh with a turban. While the school is non-secretarian, it requires complete acceptance of the uniform policy. Outwardly appearing articles of religion, and long hair, are precluded. Mrs. Sehdev testified that for the same reason, she was told the school would not accept for admission an Orthodox Jew wearing a yamulka. She testified that the conversation concluded with Mr. Begg's refusal to accept her child for admission. There is really no dispute about the factual situation, as the evidence of Mr. Beggs and Mrs. Maxwell was essentially the same as that of Mrs. Sehdev in respect of the facts.

Mrs. Sehdev's son has attended a public school for the past two years. Mrs. Sehdev does not want to now have him attend

Bayview Glen School, even if successful in this case, given the school's position. However, she is pursuing the Complaint because of the importance of the principle at stake, being that she "should have the freedom of observing my religion". The sole remedy sought is an order to compel the school to change its uniform policy. She has expressly stated she does not want any award for damages.

Both Mr. and Mrs. Sehdev emphasized that the main aspect of a practicing Sikh's dress code is to never cut his or her hair. Long hair is seen as a physical symbol of the faith. For the male Sikh, the turban is an integral aspect of the uncut hair, denoting self-respect. No male who is a practicing Sikh goes into public without covering his hair.

The Sehdevs clearly are conscientious believers in their religion. All members of the family go to one room in their house, where the holy book, the Gurugranth Sahib, is kept for prayers in the morning and evening, and attend services as a family in their gurudawra, or temple, on Sundays. They speak Punjabi at home. They are bringing up their children as practicing Sikhs.

The issue was raised as to baptism, the Sehdev family not being baptised. The Sehdevs explained that perhaps 30% of Sikhs are baptised at some point in their lives. Upon that event, the baptised male must wear a real kirpan (a small dagger), and not simply a symbolic one. As well, there is then a much longer prayer period observed each day.

Respondents asserted that a Sikh, such as Dashminder Singh Sehdev, who was not baptised, need not have long hair and wear a turban. However, it is clear from Mr. and Mrs. Sehdev's evidence, and from the expert evidence, that long hair together with a turban is an essential element of Sikhism, irrespective of baptism. Mr. and Mrs. Sehdev allowed that some Sikhs, especially in Western society, now cut their hair, and still regard themselves as Sikhs. Quite properly, Mr. and Mrs. Sehdev were not prepared to pass any judgement on these individuals. As Mr. Sehdev stated, in showing respect for the personal religious beliefs of those individuals, it is "Something between God and them".

Without any doubt, I find that Mr. and Mrs. Sehdev conscientiously believe that uncut hair (together with a turban for a male) is a basic aspect of their religion. That is enough, whether or not some other Sikhs do not adhere to this (see Pritman Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre, (F. Zemans, Ont. Bd. of Inquiry), (1981) 2 C.H.R.R. D/459). Moreover, I find that uncut hair (and the wearing of a turban by a male) is an essential aspect of Sikhism as generally adhered to and practiced by followers of the religion.

The Respondents put forward as part of their defence that Dashminder Singh Sehdev had not been accepted and "submitted no application". (Exhibit #7) However, it is clear that a formal application was not pursued simply because the Respondents took

the position that a Sikh student with long hair and a turban was unacceptable. This is clear from the evidence of not only Mrs. Sehdev, but also of Mr. Beggs and Mrs. Maxwell. Clearly, by the Respondents' own evidence, the application of the school's uniform policy, and the philosophy they assert underlies it, were the sole barriers to Dashminder's admission.

The Bayview Glen philosophy is set forth in a letter to the Ontario Human Rights Commission by Mr. Beggs (Exhibit #6) and it is useful to quote this letter at length:

- "I. There are many, many private schools in Metropolitan Toronto. Each offers its own philosophy. Some are specifically parochial, some are specifically partisan, some are specifically tied to a single educational philosophy, some are more eclectic. Some are melting pots, some are mosaics. Each attempts to define their beliefs and to offer their individual brand of education to parents. Parents are free to look at the many alternatives that exist and to select the one that is most consistent with their personal views, beliefs and philosophy.
- II. Bayview Glen believes in God and holds that He is the supreme being, and the creator of the universe. Beyond that, the school subscribes to no specific religious dogma. Rather, we subscribe to those beliefs that are common to the major organized faiths. We actively promote those precepts and concepts that are common to those faiths in order to inculcate an awareness of the sameness that exists.

It is our belief that so doing diminishes the emphasis put on differences by others. This outwardness in no way precludes the inalienable right of the individual to be different. Rather, we believe the differences, being personal, are best kept personal.

During specific times of the year we honour each other's differences through the sharing of religious and cultural experiences. Through this educative process we provide information to one another about our individual beliefs, and through education prejudice is lost.

To dwell on our differences, however, subtracts from the awareness of our similarities and it is for this reason, the aforementioned exceptions notwithstanding, that we actively promote the similarities that exist in our faiths. To this end the school's Uniform Policy has been carefully thought out and developed over many years.

The word uniform translates literally to mean 'one form' or 'sameness', and the school's uniform policy is consistent with and supportive of our religious philosophy. This policy requires that we dress outwardly the same. The uniform is specific, right down to the colour of socks and the length of hair. No additions or deletions are allowed as they detract from our outward promotion of sameness.

This philosophy has evolved over the twenty-five year history of Bayview Glen. To call it a non-secretarian philosophy would be an error. To call it non-religious would be a more grievous error. The school is, in fact, omni-religious.

To hold that our religious beliefs are discriminatory or prejudicial would be to hold that practicing Judaism is for example by definition, actively discriminating against Catholics.

- III. Parents are, and should be, free to apply to those schools that offer a philosophy consistent with their own. They are under no obligation to apply, nor should they be, to schools whose philosophy does not satisfy their prerequisites.

To interfere with this process would be to state categorically that parents do not have the right to select an alternate form of education for their children that is based on a philosophy of their own choosing. This would lead to the absurd conclusion that private schools do not have the right to exist."

Within the framework of this philosophy and policy, the school counts practitioners of 28 religions and students whose families have some 68 countries of origin. Of 763 parents, 527 were born outside of Canada. (See Exhibits #6 and #7) There are even a few Sikh students who cut their hair and do not wear turbans. The school population is truly diverse. However,

practitioners of those few religions, such as Sikhism and Orthodox Judaism, which require specific, manifest grooming or dress requirements, are excluded from admission to the school by this philosophy and policy as administered.

The Sehdevs allege unlawful discrimination on the basis of "creed, sex and ancestry" by the Respondents, contrary to sections 1, 8 and 10 of the Ontario Human Rights Code, 1981, c.53, as amended (hereafter, the "Code"). In my view, "sex" and "ancestry" were clearly irrelevant factors in the denial of admission of Dashminder to the Respondent's school. The real issue is whether there was, and continues to be, discrimination because of "creed"?

2. Issues.

- (1) Is Bayview Glen school, a private school, owned and operated by a charitable foundation, (see Exhibit #7) covered by the Code?
- (2) Is Sikhism a creed within the meaning of section 1 of the Code? Are uncut hair, and the wearing of a turban by a male adherent, aspects of the religion?
- (3) Are the Respondents in breach of sections 1 and 8 of the Code in denying access to the Bayview Glen school to Dashminder Singh Sehdev?
- (4) Are the Respondents in breach of sections 10 and 8 of the Code in promulgating and maintaining the school's strict uniform policy? Did the policy have the effect of

discriminating against the Complainant? If so, do the Respondents have a defence under section 10(a) on the basis that the requirement of adherence to the uniform policy is "reasonable and bona fide ... in the circumstances"?

- (5) Are the Respondents exempted from what would otherwise be a breach by virtue of section 17 of the Code?

3. Resolution of the Issues.

- (1) Is Bayview Glen school a private school, owned and operated by a charitable foundation, covered by the Code?

Section 8 of the Code provides:

No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

The word "person" is given an extended meaning by the Ontario Interpretation Act.

30. In every Act, unless the context otherwise requires,...

28. "person" includes a corporation and the heirs, executors,, administrators or other legal representatives of a person to whom the context can apply according to law;

As well, the Code provides in section 45(c),

In this Act,

- (c) "person" in addition to the extended meaning given it by the Interpretation Act, includes an employment agency, an employers' organization, an unincorporated association, a trade or occupational association, a trade union, a partnership, a municipality and a board of police commissioners established under the Police Act.

Clearly, any corporate entity, including a charitable foundation operating a private school, is governed by the Code.

The case law supports this view. See, for example Rawala and Souza v. DeVry Institute of Technology (1982) 3 C.H.R.R. D/1057 at paras. 9354-9396 (Ont. Bd. of Inquiry; J.D. McCamus). That this is obvious is seen as well from a reading of section 17 of the Code which refers to special interest organizations, including "educational ... institutions". Section 17 would not be necessary as an excepting provision in certain circumstances if the Code did not apply to private schools.

(2) Is Sikhism a "creed" within the meaning of section 1 of the Code? Are uncut hair, and the wearing of a turban by a male adherent, aspects of the Sikh religion?

Section 1 of the Code provides:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of ... creed ...

Dr. John W. Spellman, professor of Asian studies at the University of Windsor, testified as an expert witness for the Commission. Dr. Spellman is clearly an authority and expert on the Sikh religion (his curriculum vitae was filed as Exhibit #9).

Dr. Spellman testified that there are 15 million Sikhs in India, with more than 200,000 in Canada, about one-half of that number being in Toronto and southern Ontario, and the other one-half being centred in Vancouver.

He testified that Sikhism is a major world religion because of its history (developing in the 15th century, at about the same time as Protestantism), its well-established gurudawras or

temples, its established and orthodox creed, explicitly set forth, its global community, and its established theology that distinguishes it clearly from other religions such as Christianity, Judaism, Islam and Hinduism. Sikhism is not a sect or cult, or simply a phase of another religion. Finally, Sikhism is treated as a major religion generally, and specifically, by religious and academic writers.

Some aspects of the religion should be mentioned. Dr. Spellman testified that Sikhism was founded by a divinely inspired mystic, Guru Nanak, in the Punjab in the 15th century. Guru Nanak considered that the teachings of Hinduism and Islam were too exclusive, and he rejected the idea that God is exclusive to a particular group. Rather, God is the God of all peoples. A basic belief is the concept of equality for all people. Thus, for example, any person is welcome at any Sikh temple and must be fed and be treated equally, even in the seating arrangements. Gifts of food to the poor constitute a basic form of service for Sikhs, as a religious obligation. A Sikh finds the divine through charitable action in the real world.

The last of the ten Gurus, Guru Gobind Singh, put Sikhism on its present basis. At a great festival March 30, 1699, he established what are called "the five K's" as symbols of Sikhism. The first two are pertinent to the case at hand. First, the "Keshas" is the wearing of unshorn hair, and second is the

"Kanga", which requires the use of a comb to ensure that the hair is properly taken care of.

Dr. Spellman testified that these Sikh symbols manifest a theological statement that is the opposite of Hinduism. He stated that Hindu monks either shave their heads or have unkempt, matted and tangled hair, as symbolic manifestations that their appearance is of no significance, indicating a renunciation of the everyday world and that the divine is to be found in the dimension of the spirit. In contrast, testified Dr. Spellman, Sikhism emphasizes that the divine is to be found in the real, contemporary world. Thus, Sikhs wear their hair in an opposite fashion to Hindu monks, to symbolize and indicate their different religious perspectives. In this sense, unshorn hair to the Sikh represents spiritual vitality. As part of this requirement, a male Sikh must wear a turban and not any other form of headcovering. There cannot be compliance with the religion or self-respect unless these requirements are met. This stipulation as to unshorn hair applies to both sexes, adults and children, baptised and unbaptized Sikhs. No one in the Sehdev family has ever cut his or her hair. As such, they are known as Keshadhari Sikhs.

The third K is the "Kara" or steel bracelet on the right hand, symbolizing the tie to the church, and serving as a reminder that acts ought to be restrained from including any violence. The fourth K is the "Kirpan", or small dagger, which symbolizes the requirement of protection of the weak. The fifth

K is the "Kacahh" or the requirement of the wearing of shorts, symbolizing a code of moral behaviour which prohibits nudity and regards adultery as a major sin.

The main teachings of Sikhism are found in the Guru Granth Sahib, being the compiled teachings of the ten Gurus. This is the sacred text and foundation of Sikhism and cannot be contradicted by practicing Sikhs. There are also various Rehats or codes of conduct, including the Rehat Maryada (Exhibit #11) that serve as a guide to spiritual life.

The Kahlasa is the living body of baptised Sikhs. Baptised Sikhs are known as Amritdhari. Dr. Spellman estimated that perhaps 30% of Sikhs living in Canada are baptised. The principles of Sikhism are to fully govern pre or unbaptized Sikhs (like, for example, the ten commandments in Christianity) but baptism is analogous to entering the priesthood in Christianity, that is, religion becomes the centrally governing experience of the baptised Sikh's life. A baptised Sikh will engage in prayers in excess of 3 hours a day, and is required to rise at 3:00 a.m.. Mr. Sehdev testified that baptism is a personal choice. Dr. Spellman testified that baptism required spiritual awareness and commitment above that of the layman.

The dictates of the Shiromani Gurdwara Parbandhak Committee, Amritsar, (SGPC) were filed (Exhibit #10).

Dr. Spellman emphasized that Sikhism is more than mere belief. Essential to the belief is the practice of the religion according to its symbols and requirements. Adult Sikhs are

obliged to teach their children the tenets of Sikhism (see p.12(h) of Exhibit #11), and not cut the hair of their children (p. 12(i), Exhibit #11). A turban is essential for the male Sikh (Exhibit #11, p. 13(t)). Cutting the hair amounts to a major sin, a Kurahit. A person who cuts his hair becomes Patit or an apostate. Wearing a turban for a male is a concomitant requirement.

Sikhism is, quite clearly, a "creed" within the meaning of section 1 of the Code. Moreover, the requirement of uncut hair, and the wearing of a turban by a male, are essential aspects of Sikhism as generally adhered to and practiced by followers of the religion. Even if long hair and a turban were optional practices of Sikhism (which they are not), and even though some persons who still conscientiously believe themselves to be Sikhs may cut their hair and not wear turbans, long hair and a turban are quite clearly an inherent component of the Complainant's religion as he practices it. In Pritam Singh, supra, it was held that a baptised Sikh who was receiving rehabilitation treatment at a hospital, could wear his eight inch Kirpan. In that case, it was held that a particular religious practice which is consistent with, but not required by, a religion is nevertheless protected by human rights legislation. Creed should not be narrowly construed. American courts give a similar interpretive approach in respect of religious discrimination prohibited by Title VII of the U.S. Civil Rights Act of 1964, 42 U.S.C.

2000e(a)(1) and (j), as amended. See, for example, Redmond v. Gaf Corporation (1978) 17 FEP Cases 208 (U.S.C.A. 7th Circ.)

3) Are the Respondents in breach of section 1 and 8 of the Code in denying access to the Bayview Glen school to Dashminder Singh Sehdev? Section 1 of the Code provides:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of ... creed ...

The burden of proof is upon the Complainant and the Commission to prove a prima facie case of direct or indirect discrimination. The School's position is that it has no desire to preclude Sikhs from admission. Direct discrimination is an intentional act of discrimination. This is not a case of intentional discrimination. Rather, Sikhs are prohibited because of the neutral uniform policy, as administered. This case is, at most, one of indirect or constructive discrimination under section 10.

(4) Are the Respondents in breach of section 10 and 8 of the Code in promulgating and maintaining the school's strict uniform policy? Did the policy have the effect of discriminating against the Complaint? In my view of the evidence, this is not a case of direct, or intentional discrimination.

At the times relevant to this Complaint, section 10 read:

10. A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion,

qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances or
- (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

The school's calendar or brochure states (Exhibit #8) under the title "General Information" and the sub-topic "Religion":

Bayview Glen acknowledges God as the supreme being. While no specific sectarian dogma is promoted, all students are required to participate in the sharing of those Judeo-Christian customs that are traditionally celebrated by the school. To support the concept of interfaith sameness, the wearing or display of religious articles of any kind is prohibited.

Just above that stipulation is the sub-topic "Uniforms".

In Senior Kindergarten and beyond, students are required to wear the school uniform. Additional information is enclosed. All clothing and personal property must be labelled.

I read the stipulation as to "religious articles" as prohibiting the wearing of articles that are mere accessories (such as the "exhibition of crosses"; see Evidence, p.180), that is, I do not infer from this prohibition that it is intended to preclude the admission of a student whose essential religious identity requires the wearing of long hair and a turban. Obviously, Mr. Beggs would disagree with this reading of the brochure. As he administers the policy, apparently with Board of Directors approval, (Evidence, p. 196, 207) Sikhs and Orthodox Jews are precluded from admission because of their dress

requirements (Evidence, pp. 183, 186, 187, 190, 216). Mr. Beggs would undoubtedly also argue that it is up to him to interpret the policies of his private school. However, to read the brochure's statement on "religion" as precluding Sikhs or Orthodox Jews, is to deny the assertions of tolerance and respect that he says are inherent to the school's philosophy (Exhibit #6). Mr. Beggs says the school favours the "outward promotion of sameness" yet "we honour each other's differences" and "[t]his outwardness in no way precludes the inalienable right of the individual to be different" (Exhibit #6, quoted above). If a Sikh student is denied the right to wear long hair and a turban in the pursuit of the "promotion of sameness", then clearly there is no honouring of "differences" and clearly the "inalienable right of the individual to be different" is a sham. That is, to preclude Sikhs renders Mr. Beggs' position self-contradictory.

Indirect or unintentional discrimination arises where there is a denial of access to facilities or services because of the effect of a requirement or qualification in respect of access. The effect of the uniform policy is to deny entry to the Complainant to the Respondents' school.

In Singh v. Security Investigation Services Ltd. (1977) (unreported, P.A. Cumming, Ont. Bd. of Inquiry), the Complainant was not considered for a security guard position because of a uniform requirement that guards be clean shaven and not wear turbans. That case was under the former Code, R.S.O 1970, c.318, as amended. This was the first case to hold that indirect

discrimination was prohibited under the old Code. As well, it was held that an employer had to reasonably accommodate religious practices. Singh was subsequently approved of by the Supreme Court of Canada in O'Malley et al v. Simpson Sears Ltd. (1986) 7 C.F.R.R. D/3102 at para. 24771. Under the new Code, section 10 expressly prohibits indirect discrimination, and reasonable accommodation is also expressly required.

Mandla (Serva Singh) and Another v. Dowell Lee and Others, (1983) 2 A.C. 548 (H of L) involved a factual situation in the United Kingdom virtually identical to the one at hand. A school refused admission to a Sikh boy because he would not cut his hair and do without a turban, so as to comply with the school uniform policy. The school had about 300 pupils of widely different backgrounds, including 5 who were Sikhs who did not wear turbans. The strict uniform policy was said to be intended to minimize external differences between races and social classes. The school felt that for a number of reasons it could provide a better system of education if it were allowed to discriminate.

To be successful under the Race Relations Act, 1976, the plaintiffs had to establish that they were, as Sikhs, members of a "racial group", defined by reference to "ethnic ... origins". The House of Lords allowed the appeal, holding that for the purposes of the legislation "ethnic ... origins" included a group which was a segment of the population distinguished from others by a combination of shared customs, beliefs, traditions and characteristics drawn from a common past.

The plaintiffs' case was considered to be one of indirect discrimination. Section 1(1)(b) of the legislation provides:

"A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if - (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but - (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it applied; and (iii) which is to the detriment of that other because he cannot comply with it."

This provision is, in substantive scope, similar to section 10 of the Ontario Code.

The House of Lords held that the respondent school could not establish its "No turban" rule was "justifiable" in the relevant sense. Lord Fraser of Tulleybelton (whose reasons were concurred in by the other members of the court) held that under section 1(1)(b), a restriction is only justifiable when shown to be "justifiable without regard to the ethnic origins of that person" (p. 566). However, the respondent was objecting to the turban precisely because it was a manifestation of the plaintiff's ethnic origins.

Referred to with approval in Mandla was an earlier decision of the English Court of Appeal in Panesar v. Nestle Co. Ltd. (Note), (1980) 1 C.R. 144 where the Court held that a rule forbidding the wearing of beards in the respondent's chocolate

factory was "justifiable" within the meaning of section 1(1)(b)(ii) on hygienic grounds (Mandla, supra at p. 567).

The essence of the "justifiable" defence under the U.K. statute is that the exclusionary policy must be supportable on objective grounds. It is unlawful to deny access to a school, unless the restriction on admission has nothing to do with the ethnic origin of the person to whom it applied. Given that a purpose of the uniform policy was to prohibit the external manifestation of one's ethnic origin, unlawful discrimination was held to be present.

The "justifiable" defence in the U.K. statute seems similar in substantive content to the "reasonable and bona fide" (r.b.f.q.) defence of section 10. The standard in the present Ontario statutory provision derives from Ontario Human Rights Commission et al v. Borough of Etobicoke, (1982) 132 DLR 14 (SCC), which held that the r.b.f.q. defence arises only when a respondent can establish both that there was no intention to discriminate against a complainant and also that on an objective basis the requirement in issue was reasonably necessary to the respondents' activity (per McIntyre, J. at pp. 19, 20).

In my opinion, the Commission and Complainant have established a prima facie case of discrimination because of creed, under section 10 of the Code. Hence there is a prima facie breach of sections 1 and 8.

The Respondent has not, in my opinion, established that the uniform policy "requirement" is "reasonable and bona fide in the

circumstances", and the onus is upon it to do so. The essence of the situation is a balancing of interests. The school's preference for a strict uniform policy is not a relevant reason for compromising the Complainant's religion. Moreover, the Respondents are obliged to reasonably accommodate the Complainant (OHRC and O'Malley v. Simpson-Sears Limited (1986) 7 C.H.R.R. D/3102 (SCC) at para. 24777), and the Respondents could easily do so by modifying ever so slightly the uniform policy, but the Respondents refuse to do so.

I emphasize, that, in my opinion, the objectives of a uniform policy will not really be compromised by making the slight exception required for practicing Sikh students. One can contrast the situation with that seen in Caldwell v. Stewart (1985) 15 DLR (4th) 1 (SCC). In that case, the Supreme Court of Canada considered the bona fide occupational qualification in the context of the British Columbia human rights legislation. The complainant had been a practicing Catholic; however, she then entered into a marriage with a divorced person in a ceremony outside the Church with the result that her employer, a Catholic school board, terminated her teaching contract. The Court upheld the employer's interest in demanding that its Catholic employees adhere to Catholic tenets as a prerequisite to continued employment.

McIntyre, J. stated:

"The Church employs ... the establishment of its own schools which have as their object the formation of the whole person, including education in the Catholic faith. ...The teaching of doctrine and the observance

of standards by the teachers form part of the contract of employment of the teachers. Religious and moral training occupies the principal place in the curriculum. ... The hiring procedures adopted by the school were designed to give effect to the specific goals of the school" (at pp.5, 6).

McIntyre, J. referred to his test set forth in Etobicoke, supra, stating that in the situation before the Court in Caldwell, the application of the Etobicoke test would be framed as:

"Is the requirement of religious conformance by Catholic teachers, objectively viewed, reasonably necessary to assure the accomplishment of the objectives of the Church in operating a Catholic school with its distinct characteristics for the purposes of providing a Catholic education to its students?" (p.17).

.....

"It is my view that the Etobicoke test is thus met and that the requirement of conformance constitutes a bona fide qualification in respect of the occupation of a Catholic teacher employed in a Catholic school.

.....

In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a bona fide qualification" (at p. 18).

If the teacher's religious preference did not interfere with the essential purpose of the school, then there would be no defence on the part of the school employer. An example can be seen in an American case. In Edwards v. School Bd., City of Norton, VA (1980) 21 FEP Cases 1375, the U.S. District Court, Western District of Virginia, considered a complaint under Title VII of the U.S. Civil Rights Act of 1964, as amended, 42 U.S.C.

2000e et seq. The plaintiff, a member of the Worldwide Church of God, required her to be absent from her teaching on seven annual holy days. The Court held that the employer school board had to accommodate her, as it could not establish that to do so would be an undue hardship.

Similarly, in Christie v. Central Alberta Dairy Pool (1985) 6 C.H.R.R. D/2488, it was held by an Alberta Board of Inquiry that an employee who was a member of the World Wide Church of God and who gave notice that he could not work on a particular holy day, was unlawfully discriminated against when the employer terminated his employment. The Board held that there is an obligation on the employer to accommodate the religious requirements of employees unless that accommodation causes an undue hardship. Thus, the employer's action was not based on a bona fide occupational qualification. (ibid, at para. 20667). See also Osborne v. Inco Limited, (1984) 5 C.H.R.R. D/2219.

In the instant situation, in my view, and I so find on the evidence, the objectives of a uniform policy will not be compromised by making a slight exception for practicing Sikh students and Orthodox Jew students. That is, the school can accommodate practicing Sikh and practicing Orthodox Jew students without undue hardship. It is not reasonable in the circumstances to impose the uniform policy requirement upon practicing Sikhs or Orthodox Jews.

The constructive discrimination provision in the Code, section 10, with the 1986 amendments (not yet proclaimed in

force), makes it clear that there is not a r.b.f.q. defence to indirect discrimination "unless ... the needs of the group of which the person is a member cannot be accommodated without undue hardship ... [on the employer]" (S.O. 1986, c.64, s.18(8)).

Once the amendments are proclaimed in force, section 10 will read:

10. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
 - (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
 - (b) it is declared in this Act, other than in section 16, that to discriminate because of such ground is not an infringement of a right.
- (2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
- (3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

Even without the 1986 amendments to section 10, it is my opinion that under section 10 of the Code as enacted in 1982, and as applicable to the time frame relating to the specific factual situation before this Board of Inquiry, it is necessary for the Respondents to prove "undue hardship" before the respondents can

establish that they could not reasonable accommodate, and hence, have a r.b.f.q. defence (see (Cindy Cameron v. Nel-Gor Castle Nursing Home et al (1984) 5 C.H.R.R.//2170, para. 18383.) It has also been held that this would be a requirement under the old Code, 1980 R.S.O., c.340, and R.S.O. 1970, c.318, as amended. (See Singh v. Security and Investigation Services Ltd., unreported, Ontario Board of Inquiry (Cumming) 1977).) For reasons I have expressed elsewhere, in my opinion, the reasoning of the majority decision in Canadian National Railways co. v. Bhinder and Canadian Human Rights Commission [1985] 2 S.C.R. 561; 63 N.R. 185, are not applicable to the wording of the Ontario Human Rights Code, as such wording is different from that in the federal human rights legislation, as examined in Bhinder. See Laurene Wiens v. Inco (Ont. Bd. of Inquiry: P.A. Cumming, Feb. 9, 1987, as yet unreported).

(5) Are the Respondents exempted from what would otherwise be a breach by virtue of section 17 of the Code?

This is not an easy question to answer. There do not appear to be any decided cases interpreting section 17 of the Ontario Code. I have also reviewed the legislative history in respect of section 17, but it is not helpful to the problems of interpretation in the instant situation (see the clause-by-clause analysis of Bill 7 before the Standing Committee on Resources Development, November 17, 1981, at pp. 21-28). Nor do there appear to be any decided cases interpreting the predecessor

provision to section 17 in the former Code, R.S.O. 1980, c.340, section 4(7), which provided that it would not be unlawful discrimination in a situation involving an "exclusive ... educational ... organization ... not for private profit ... where ... creed ... is a bona fide occupational qualification and requirement".

Section 17 gives an exemption to what would be otherwise unlawful discrimination, whether direct or indirect.

17. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, is not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified. (emphasis added)

An analogous provision is section 23 of the Code, which provides that the right to equal treatment with respect to employment is not infringed by such organizations. Several points need to be noted. First, although the exemption in section 17 is in respect of an infringement of the "rights under Part I", this relates as well to rights infringed under section 10 (but for the section 17 exemption) because section 10 speaks of a breach of that provision as meaning that thereby a "right of a person under Part I is infringed". That is, indirect discrimination in breach of section 10 is thereby a breach of a protected right in sections 1 to 6 and, in turn, a consequential infringement of section 8.

What is the impact of section 17 upon the present situation? Clearly, the Respondent is an "educational ... institution". It restricts, not explicitly but in effect, through the application of its uniform policy, "membership or participation" in the school to persons who are similarly identified as non-Sikhs. If membership or participation in a school were expressly restricted, for example, to Anglicans, then the school would be an institution "that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination" (ie. by creed), and there would be a complete defence by virtue of section 17. In such an instance, there would be no breach of Part I of the Code. In Caldwell, supra, the Supreme Court of Canada considered section 22 of the Human Rights Code, R.S.B.C. 1979, c.186 (now s.19(1) B.C. Human Rights Act, S.B.C., 1984, c.22) which is similar in substance to section 17 of the Ontario Code.

McIntyre, J., in accepting the finding of the B.C. Board of Inquiry that section 22 applied in the factual situation of Caldwell as an excepting provision, stated:

"The purpose of the section is to preserve for the Catholic members of this and other groups the right to the continuance of denominational schools. This, because of the nature of the schools, means the right to preserve the religious basis of the schools and in so doing to engage teachers who by religion and by the acceptance of the Church's rules are competent to teach within the requirements of the school" (at 21).

Does the instant situation fit within the exemption of section 17? I think not. The Bayview Glen school cannot be said to be an institution "primarily engaged in serving the interests

of persons identified by" one or more creeds. Nor can it even be said that the school "is primarily engaged in serving the interests of persons identified" by not being adherents to a religion that necessitates the wearing of symbols, such as Sikhism.

Section 17 does not, in my opinion, allow the latitude the Respondents assert. Respondents state that they can, because Bayview Glen School is a special interest organization, exclude anyone who does not conform to the uniform policy. Section 17 clearly allows a discriminatory policy to promote "sameness". However, the aspect of "sameness" must be a positively stated identifying badge of entry related to a prohibited ground of discrimination; such as "creed" (for example, all students must be Anglicans, when and because the school in question is an Anglican school). Clearly, the policy of the legislature is to allow special interest groups to further their particular interest, notwithstanding that they are discriminating in doing so. This exemption is consistent with an underlying value of respect for the diversity of religions and culture in Ontario. That is, if we are going to truly respect a person's religion, this certainly implies the right to have one's children in a private school where all the other children are adherents to the same religion. Indeed, society as a whole gives its financial support to such a school through the tax expenditure present in the charitable deductibility status for such a school.

However, exceptions to the basic provisions of the Code, and the underlying values thereof, should be narrowly construed. In my view, section 17 does not exempt a school from every act of discrimination that is a violation of a protected right under Part 1. It does not give a blanket exemption to private schools. For example, an Anglican school that takes only Anglican students could not rely upon section 17 to excuse discrimination against a black Anglican applicant for admission.

The uniform policy of Bayview Glen is simply an act of indirect discrimination, that has the effect of excluding Sikhs. If the Board of directors of Bayview Glen want to expressly enact and publish a policy that limits access to the school to certain religious groups, they can do so. But they cannot do so inadvertently and invidiously through a uniform policy. Frankly, it would be surprising to me if the Board of Directors did not, upon reflection, simply modify their uniform policy to accommodate Sikhs and Orthodox Jews. By doing so, they would be more truly giving effect to a policy of tolerance and respect for the religions of all peoples. This is the asserted philosophy of the school.

The school obviously has a broad diversity of students, generally reflective of the Toronto mosaic, and it would seem doubtful that a Board that is reflective of this diversity would intentionally discriminate against any particular religious adherent simply because that student must wear religious symbols which depart from the standard dress required by the uniform

policy. The slight liberalization of the uniform policy does not in any way compromise the school's objectives.

Obviously, the school principal differs in his opinion from my view of the merits of the situation. The Board of Directors, as the entity ultimately responsible for the setting of admissions policy, has the freedom given section 17 to discriminate on an otherwise unlawful basis, but to do so must expressly adopt and publish a discriminatory policy. That policy would have to say expressly and publicly either that admission is limited to students of certain identified religions or, at least, that admission is open to students of all religions except certain identified ones (Sikhism and Orthodox Judaism) if a student intends to adhere to grooming or dress requirements of such identified religions.

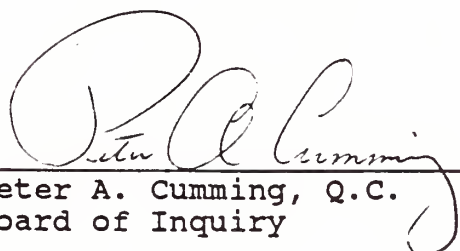
ORDER

Having found that the right of the Complainant to equal treatment with respect to services without discrimination because of creed has been infringed by the Respondents, the L. Doreen Hopkins Foundation and John Douglas Beggs, and the infringement is a contravention of sections 10, 1 and 8 of the Code, for the reasons given, this Board of Inquiry orders as follows:

1. The Respondents L. Doreen Hopkins Foundation and John Douglas Beggs are directed to cease and desist in

administering the Bayview Glen School's uniform policy so as to refuse admission to students, in particular those Sikhs who have long hair and turbans, to the Bayview Glen School because of their creed; are directed to extend equal treatment in respect of the services of the Bayview Glen School to all students, and to all applicants to be students, and in particular to Sikhs, without unlawful discrimination because of creed; and are directed to allow Sikh students and students of other religions who attend the school to maintain their dress and appearance in accordance with their religious practices, notwithstanding that this requires a departure from the Bayview Glen School's otherwise applicable school uniform policy.

Dated at Toronto this 11th day of March, 1988.



Peter A. Cumming, Q.C.
Board of Inquiry

